Supreme Court, U.S.
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No. 93-1499

In The
Supreme Court of the United States
October Term, 1993

ROBERT E. WHEELER
Petitioner,

v.

NEBRASKA STATE BAR ASSOCIATION,
Respondent.

On Petition For A Writ of Certiorari To the Nebraska Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

At pages 2 and 3 of the Petition for Writ of Certiorari, Petitioner cites only the First, Fifth and Fourteenth Amendments to the United States Constitution as the relevant constitutional and statutory provisions (required by Sup. Ct. R. 14.1(f) to be set forth verbatim). It should be noted that Petitioner does *not* assert, either in his reference to relevant constitutional and statutory provisions or in his articulation of the questions presented for review, that his state court petition asserted a cause of action under 42 U.S.C.A. §1983 (1981).

STATEMENT OF THE CASE

The opinion of the Supreme Court of Nebraska which Petitioner asks the Court to review is set forth as Appendix A to the Petition for Writ of Certiorari at pages 61 through 89. (Petitioner's Appendix A) In its decision, the Nebraska Supreme Court affirmed the dismissal of Petitioner's amended petition. Such dismissal was entered by order of the District Court of Custer County, Nebraska on March 20, 1992. Said order is reproduced as Respondent's Appendix A. Said order was issued after the Petitioner elected to stand on his amended petition following the district court's order on February 28, 1992 sustaining Respondent's demurrer to Petitioner's amended petition. Petitioner's election to stand is reproduced as Respondent's Appendix B. The February 28, 1992 order of the district court sustaining the demurrer was reproduced as Appendix C to the Petition for Writ of Certiorari, and is therefore not

reproduced in this response. The demurrer of the Respondent which was sustained by the District Court of Custer County, Nebraska is reproduced as Respondent's Appendix C. The October 7, 1991 Order of the District Court of Custer County, Nebraska, which order was reproduced as Appendix B to the Petition for Writ of Certiorari, was not appealed to the Nebraska Supreme Court, and is therefore not germane to the Petition for Writ of Certiorari.

The only factual allegations reviewed by the Nebraska Supreme Court were those set forth in the Amended Petition. (Petitioner's Appendix D). Occasional embellishments of the "facts" in the Petition for Writ of Certiorari, such as the reference at pages 15-16 to allegations that "the Bar knew that its members were using its evaluation as a write-in libel of the petitioner," should be disregarded. Similarly, references to "facts which the bar has admitted in discovery" and any inferences drawn by Petitioner from discovery materials (see page 13 and pages 22-23 of the Petition for Writ of Certiorari) should be disregarded, as no discovery materials were reviewed by the district court or the Nebraska Supreme Court.

SUMMARY OF ARGUMENT

The Nebraska Supreme Court affirmed the dismissal of Petitioner's Amended Petition solely on the basis of Petitioner's failure to state a cause of action for defamation under Nebraska law. Although the Nebraska Supreme Court did not decide whether it was appropriate to recognize a privilege for the publication of judicial evaluation surveys,

the availability of a privilege would also be decided as a matter of state law. Since the decision is based on state law, it is not an appropriate case for review by this Court.

Petitioner's allegations of deprivation of constitutional rights also fail to state a cause of action. The requisite elements of a cause of action for defamation were found to be lacking, so it was unnecessary for the Nebraska Supreme Court to determine whether any claim had been stated for an improper deprivation of constitutionally protected rights. This Court has previously determined, in any event, that a person's interest in his or her reputation is not a constitutionally protected property or liberty interest. The Amended Petition is also deficient under Nebraska procedural laws which require a plaintiff to plead facts rather than a theory of recovery or legal conclusions.

Petitioner's allegations regarding a right to a fair trial and a demand for an injunction also fail to set forth any recognized causes of action, and no authorities are presented to support and clarify Petitioner's theories underlying such allegations.

ARGUMENT IN OPPOSITION

I. No Federal Question is Raised by the Defamation Claim.

Rule 10 of the Supreme Court Rules specifies that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons

therefor." With regard to appeals from a state court of last resort, the rule specifies the following reasons that will be considered:

> (b) when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (c) when a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

The threshold question, therefore, becomes whether a federal question was decided by the Nebraska Supreme Court. The existence of a federal question is essential to the review of a state court decision. See *Illinois v. Rodriguez*, 110 S.Ct. 2793, 2798 (1990), in which the Court stated that "when a state court decision is clearly based on state law we will not review the decision."

The first question for review articulated by Petitioner on page 1 of his Petition for Writ of Certiorari is whether a cause of action for defamation was stated. Such a question, however, does not raise a federal question. "Generally speaking, the existence of tort remedies is a matter of state law. A state is free to create new causes of action and to abolish older ones." *Kranson v. Valley Crest Nursing Home*, 755 F.2d 46 (3d Cir. 1985). Thus, it is up to the State of Nebraska to determine whether it wishes to

recognize a cause of action for defamation under facts such as those alleged by Petitioner in the lawsuit he filed in this matter.

Despite the frequent presence of First Amendment issues raised in defense to defamation actions, numerous decisions have characterized the question of whether a particular statement is defamatory as a question of state law. For example, in *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069, 1082-1083 (3d Cir. 1988), the Third Circuit considered whether a magazine article was defamatory, and recognized that "[t]o determine whether Times' article was defamatory per se, that is, whether it was incapable as a matter of law of any non-defamatory meaning, we therefore must apply New Jersey law . . . ." See also *Lavin v. New York News, Inc.*, 757 F.2d 1416 (3d Cir. 1985). Similarly, in *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072, 1077 (3d Cir. 1985), *cert. den.* 106 S.Ct. 182 (1985), the Third Circuit stated: "Although replete with First Amendment implications, a defamation suit fundamentally is a state cause of action."

The interplay between federal constitutional issues and state law questions in defamation cases was explained well in *McDowell v. Paiewonsky*, 769 F.2d 942 (3d Cir. 1985). In that case, the court noted that "in the first instance, the Court must determine whether the defendant has injured the plaintiff's reputation under the applicable state law. If so, then the Court must ascertain whether the First Amendment nevertheless prohibits the imposition of liability." *Id.* at 945. Thus, federal constitutional questions are not at issue in a defamation case unless it has first been

determined that the plaintiff has suffered an injury to reputation that is otherwise actionable.

In the present case, the Nebraska Supreme Court reached its decision solely on the basis of its determination that the actions alleged were not defamatory and were therefore not actionable by Petitioner. The Nebraska Supreme Court noted that the "question of whether a particular publication is defamatory is, in the first instance, a question of law for the court." Petitioner's Appendix A, p. 69. The court applied a 'totality of the circumstances' test to examine the nature and full content of the communication and the knowledge and understanding of the audience to whom the publication was directed. The court observed that the Bar Association's survey

> was a compilation of attorneys' subjective ratings on each characteristic. As such, the rulings given him represented a collective subjective evaluation, which by its very nature ranged from well founded to utterly wrong. . . . Ratings by their very nature will reflect the philosophy of those doing the rating and are nothing more than expressions of subjective evaluations concerning a judicial candidate's qualification. There is simply no objective method to determine the rating an individual judge should receive in any given performance category; therefore, by their very subjective nature, ratings cannot imply a provably false factual assertion.

Petitioner's Appendix A, pp. 85-87.

The Nebraska Supreme Court also discussed the press release about which Petitioner complains so strenuously. Such release was issued to the news media of the State of Nebraska on May 2, 1990, approximately six months prior to the retention election and two months prior to release and publication of the summary of the bar survey. In the release, the Bar Association characterized the surveys as providing "solid information," and as giving each judge a "report card of his or her strengths and weaknesses." The Nebraska Supreme Court considered the context in which the characterization was made, and concluded it was a permitted exaggeration. The court also rejected Petitioner's complaints about the Bar Association's representation that, to assure valid results, lawyers must base their evaluation on recent, first-hand experience. The court said that such statement "merely describes the manner in which the bar association intended the lawyers to perform." Ultimately, the court concluded that "the judicial performance evaluation was, as a matter of law, not defamatory. Wheeler thus failed to state a defamation cause of action." Petitioner's Appendix A, pp. 87-88.

Petitioner argues that the Nebraska Supreme Court, in essence, granted the Nebraska State Bar Association an absolute immunity from liability with regard to its publication of judicial evaluation surveys. Respondent disagrees with this characterization of the Nebraska Supreme Court's decision, as the foregoing excerpts from the opinion merely demonstrate the court's assessment, under the totality of the circumstances, that the Bar Association's statements and publication of the survey results do not constitute the

type of statements which can be considered defamatory. Nonetheless, it should be noted that it would have been well within the province of the Nebraska Supreme Court to recognize a privilege for the Bar Association as a matter of state law. (Indeed, Respondent argued to the Nebraska Supreme Court that a privilege for judicial evaluation surveys should be recognized because of the important public purpose they serve. Respondent's Appendix C, p. App. 4.) Recognition of such an immunity would not in any event raise a federal question appropriate for review by this Court, since the question of whether certain speech is protected by a privilege is also a question of state law. In *Warren v. Bank of Marion*, 618 F.Supp. 317 (D.C. N.J. 1985), the court explained that the law regarding privileges "is based on public policy protecting communications made in certain circumstances that might otherwise be actionable . . .", and that it "is well established that state law governs when the privilege defense is raised in a private individual defamation action." *Id.* at 324. In *Doe v. Doe*, 949 F.2d 736 (5th Cir. 1991), it was held that the definition of actual malice under Louisiana law was controlling in a defamation case, in light of the court's determination that the fair reporting privilege was a privilege created by state law. (The *Doe* court observed that the Louisiana common law definition of actual malice was narrower than the definition established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).)

A reporter's privilege created by Nevada statute was considered in *Laxalt v. McClatchy*, 116 F.R.D. 438 (D. Nev. 1987). The court observed that Nevada's privilege appeared to be the strongest of any such state enacted privileges, and that

> the legislature of the state of Nevada . . . has made clear by the enactment of §49.275 that there is no exception from this privilege in defamation cases. In so doing, it has decided that the confidentiality of new sources and the attendant benefit to the public, is a greater interest than the rights of an individual defamation plaintiff. Whereas constitutional consideration might force an exception to the rule in criminal prosecutions, there is no such constitutional implication in a defamation case.

Id. at 452 (citations omitted).

Even though the question of whether a petition states a cause of action for defamation is a question of state law, it should also be pointed out that the decision of the Nebraska Supreme Court in this case rests soundly on principles enunciated in *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695 (1990), *Letter Carriers v. Austin*, 95 S.Ct. 2770 (1974) and *Greenbelt Pub. Assn. v. Bresler*, 90 S.Ct. 1537 (1970). All of such cases are consistent with the Nebraska Supreme Court's approach of reviewing the allegedly libelous language in its broader context to assess whether a reader would have understood the statement to be a factual assertion.

II. No Cause of Action was Stated for Deprivation of Constitutional Due Process Rights.

The second question presented by Petitioner on page 1 of his Petition for Writ of Certiorari asks the Court to determine whether a cause of action was stated for deprivation of Petitioner's constitutional right to due process under the Fifth and Fourteenth Amendments. Petitioner's argument in support of his constitutional arguments is brief and fails to clearly articulate a legal theory in support of Petitioner's constitutional arguments. See pages 54 through 59 of the Petition for Writ of Certiorari.

Rule 14.5 of the Supreme Court Rules provides that "[t]he failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." It should not be sufficient for Petitioner to make generalized and vague assertions of his legal rights without in some way supporting those assertions with proper legal authorities. See *Ellis v. Dixon*, 349 U.S. 458 (1955), in which a writ of certiorari was dismissed as having been improvidently granted, and the court commented: "What has been alleged is entirely too amorphous to permit adjudication of the constitutional issues asserted." *Id.* at 462.

Petitioner's constitutional argument seems to be that, if a person is treated "unfairly," there must be a constitutional violation for which there is a remedy. The only authority cited by Petitioner in support of his contention

that he must have a remedy for what he views to be a deprivation of due process is *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). The *Millman* decision, however, does not support the view that every wrong has a remedy under the law. *Millman* was a claim filed under Nebraska's Political Subdivisions Tort Claims Act. The district court concluded that it lacked subject matter jurisdiction due to the failure of the plaintiff to allege compliance with the statutory requirement that a tort claim be filed with the political subdivision prior to commencement of litigation. The Nebraska Supreme Court reversed, holding that the notice requirement was not an essential element of a negligence cause of action to be plead in the petition, but, rather, was a condition to filing a negligence suit against a political subdivision, which condition, in effect, would be waived if not raised by the defendant as an affirmative defense in an answer or by an appropriate demurrer. Thus, it was merely in this context that the Nebraska Supreme Court quoted from previous decisions, as follows: "A cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty." In no way does the *Millman* decision support Petitioner's apparent view that Nebraska has recognized a cause of action for every perceived wrong.

Petitioner asserts without any supporting authorities that the "Civil Rights Act was passed to assure a remedy to people in the Petitioner's position." Petition for Writ of Certiorari, page 56. Presumably, Petitioner's reference to the "Civil Rights Act" is a reference to 42 U.S.C.A. §1983 (1981), but the precise basis for Petitioner's constitutional

arguments is unclear. A review of the Amended Petition filed by Petitioner in this case reveals only two paragraphs which even remotely address any constitutional claim. Paragraph 43 of the Amended Petition states:

> That the defendant has through its libel taken from the plaintiff his good reputation in his profession and in his community without due process of law, which principle is the cornerstone of the legal profession which the defendant purports to lead in the State of Nebraska.

Paragraph 45 of the Amended Petition states:

> That the above-alleged actions of the defendant has deprived the plaintiff of his federal rights of procedural and substantive due process, to the damage of the plaintiff.

Petitioner's attempt to turn a state law defamation action into a federal constitutional question ignores the fact that libel cannot form the basis for a cause of action for violation of constitutional rights under 42 U.S.C. §1983 or any other cause of action for violation of federal or state constitutional due process rights. In order for a plaintiff to prevail under any such cause of action, he must have a constitutionally protected property or liberty right to which the Fourteenth Amendment's procedural due process protections would attach. *Board of Regents v. Roth*, 92 S.Ct. 2701 (1972). It has been well established that in order to properly state a cause of action for violation of due

process rights, the plaintiff must allege more than merely claiming injury to good reputation. In *Paul v. Davis*, 96 S.Ct. 1155, 1165-1166 (1976), this Court held that a plaintiff's

> interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law
>
> . . . .

This Court has frequently observed that the property interests to be protected by due process are not created by the Constitution, but, rather, are created and defined by an independent source such as state law. *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985), *Goss v. Lopez*, 95 S.Ct. 729 (1975), *Board of Regents v. Roth*, 92 S.Ct. 2701 (1972). Similarly, it has been stated that the due process clause is not a guarantee of certain rights. "[I]t forbids the state itself to deprive individuals of life, liberty or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *Collins v. City of Harker Heights, Texas*, 112 S.Ct. 1061, 1069 (1992).

In *Wade v. Goodwin*, 843 F.2d 1150 (8th Cir. 1988), the claimant brought a §1983 action against the director of the Arkansas State Police, asserting claims of slander, denial of due process and equal protection, invasion of privacy, and chilling effect on exercise of his First Amendment rights of speech and association. In *Wade*, the director of the Arkansas State Police compiled and circulated a list of persons, including Mr. Wade, identified as "survivalists" which included members of the Ku Klux Klan and other similar organizations. The Eighth Circuit concluded that Mr. Wade was not denied any constitutional rights. The court stated:

> Wade's allegations, beyond general harm to reputation, were that "he will find it impossible to make a living or obtain loans or credit." These allegations do not state a § 1983 claim. One's reputation alone is neither a "liberty" nor a "property" interest protectable by the due process clause of the Fourteenth Amendment. . . . . Wade's claim of injury to his ability to make a living and obtain loans and credit, even if true, do not implicate any action by the State of Arkansas beyond a general injury to his reputation. . . . We believe that the injuries described by Wade are precisely the kind of injuries that the Supreme Court believed were protected against by state tort law rather than by the due process clause of the Fourteenth Amendment. *Paul v. Davis*, 424 U.S. at 711-712, 96 S.Ct. at 1165-66.

Id. at 1152. Wade's attorney had asserted that his client primarily wanted a "name clearing" hearing, but the court concluded:

> Perhaps, unfortunately, neither this court nor the district court has jurisdiction under §1983 to give Wade a name-clearing hearing. At bottom, his complaint alleges, if any cause a state tort action for defamation of character. Thus, we have no choice other than to deny relief here.

Id. at 1153.

In the case of *Gorman v. Lukowsky*, 431 F.2d 971 (6th Cir. 1970), the Sixth Circuit dealt with a §1983 claim with facts which are very similar to the case at bar. In *Gorman*, the claimant was an attorney who was defeated in an election for a circuit court judgeship in Kenton County, Kentucky. The defendants included the incumbent judge who defeated Gorman and three attorneys who served on the incumbent judge's election campaign committee, along with the president and certain officers of the Kenton County Bar Association. Gorman alleged that the defendants conducted a poll among the members of the Kenton County Bar Association concerning the qualifications of Gorman and the incumbent judge. The results of the poll were highly unfavorable to Gorman. The poll included information that indicated that according to the opinions of the attorneys practicing in Kenton County, Gorman's legal knowledge rated a 5% as compared to 95% given to the incumbent judge. After this poll was completed, the defendants had the

results of the poll published in two large advertisements in the local newspapers. Gorman later alleged that the results of the poll and the advertisement falsely portrayed him as lacking the qualifications for the office of judge, and that the defendants defamed his character, reputation, and good name in the community. The Sixth Circuit concluded that Gorman had failed to state a proper cause of action under §1983, and that the suit was essentially an action for libel. *Id.* at 972.

The Nebraska Supreme Court determined it was unnecessary to determine Petitioner's separate constitutional claims because of its determination that Petitioner had failed to state a cause of action for defamation. Petitioner's Appendix A, p. 88. Dismissal of the constitutional claims could also have been justified on the grounds of lack of specificity in the pleadings. The Amended Petition fails to plead several essential elements under §1983. Mere conclusory allegations are not enough. *Streetman v. Jordan*, 918 F.2d 555 (5th Cir. 1990), *Hall v. Bellman*, 935 F.2d 1106, 1113 (10th Cir. 1991). Civil rights claims must be plead with some particularity before a plaintiff is allowed to subject the defendant to burdensome discovery and litigation. *Id.*

For example, in order to properly state a claim under §1983, a complaint must allege that the deprivation of a right occurred through the conduct of a person acting "under color of state law." *Morton v. Becker*, 793 F.2d 185 (8th Cir. 1985). Liability attaches only to those wrongdoers "who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, 365 U.S. 167, 172 (1961), rev. on other grounds *Monell v. Dept. of Social*

Services, 436 U.S. 658, 663 (1977). The Petitioner's Amended Petition contains no such language. The only arguable nexus that the Amended Petition makes between the Bar Association and state action is found in paragraph 2 where it is alleged that the Nebraska State Bar Association is an association organized and administered by the Supreme Court of the State of Nebraska. Merely alleging that the Respondent is an association organized and administered by the Supreme Court of the State of Nebraska is not a sufficient nexus to establish that the NSBA was acting under color of state law. See *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179 (1988), holding that the National Collegiate Athletic Association was not acting under color of state law and was not acting as the agent of the University of Nevada at Las Vegas when it recommended sanctions against UNLV if it failed to discipline Tarkanian. See also *Keating v. Martin*, 638 F.2d 1121 (8th Cir. 1980) (in which the Eighth Circuit found that an official with the Missouri Bar Association was not acting under color of state law when he initiated disbarment proceedings); and *Niehaus v. Kansas Bar Association*, 793 F.2d 1159 (10th Cir. 1986) (in which two employees whose employment was terminated by the Kansas State Bar Association brought suit against the Kansas Bar Association alleging in part that the termination was in violation of their §1983 rights based upon the First and Fourteenth Amendments, and the Tenth Circuit found the element of state action to be lacking).

The Amended Petition is further deficient in that it fails to assert facts that could support a reasonable inference that there is a causal connection between the alleged deprivation and the challenged conduct. An inability to

make this reasonable inference will be cause for dismissal. *Morton v. Becker, supra; Chapman v. Musich*, 726 F.2d 405, 407 (8th Cir. 1984). As set forth in the Amended Petition, the alleged deprivation relates only to Petitioner's reputation. Even if Petitioner's claim is construed more broadly to allege the loss of his job as a judge, it must be emphasized that Petitioner's job security depended on the whims of the voters. Since it is the public who voted to remove Petitioner from the bench and it is impossible to determine what was in the minds of the voters, there is no reasonable inference that the court could draw to conclude that the due process claims set forth in paragraphs 43 and 45 of the Amended Petition had any logical nexus to the outcome of the retention election.

The dismissal of Petitioner's purported cause of action for deprivation of constitutional rights is appropriate under the requirements of Nebraska procedural law. "Under the Nebraska system of code pleading, the plaintiff is required to plead the facts, not the theory of recovery. The pleading of legal conclusions is insufficient to raise an issue of fact." *Newman Grove Creamery v. Deaver*, 208 Neb. 178, 182, 302 N.W.2d 697, 700 (1981) (citations omitted); *Neb. Rev. Stat.* §25-804 (Reissue 1989).

III. No Cause of Action Was Stated for Deprivation of a Constitutional Right to a Fair Trial.

The third question presented by Petitioner is whether a cause of action was stated for deprivation of Petitioner's constitutional right to a fair trial. At no place in the Amended Petition did Petitioner allege that the Bar

Association had deprived him of a federal or state constitutional right to a fair trial, nor did he make mention of any such right, so it is unnecessary to consider his current contention that such a cause of action was alleged. Furthermore, Petitioner does not seem to be saying that he has actually been deprived of a right to trial, but merely that one effect of the Nebraska Supreme Court's decision is that future litigants might be deprived of fairness in their trials. Such an allegation does not represent an actual case or controversy, is not supported by any legal authorities, and is so remote and speculative that it should not merit further consideration. See also Sup. Ct. R. 14.5 and *Ellis v. Dixon*, supra.

IV. No Cause of Action for Injunction Was Stated.

The final question presented for review by Petitioner is whether his petition stated a cause of action for "injunction." See page 1 of Petition for Writ of Certiorari. This question, and the two-sentence argument advanced in support of the contention that a cause of action for injunction was stated (see page 59 of Petition for Writ of Certiorari) suffer from the same lack of clarity and detail discussed above with regard to Petitioner's constitutional arguments. Since an injunction is a remedy to be awarded in appropriate circumstances, as opposed to a separate cause of action, it is difficult to follow Petitioner's argument in this regard. In any event, the existence of such a cause of action and the Nebraska Supreme Court's ruling with regard thereto would appear to be solely a matter of state law, and is not an appropriate question for review in this proceeding.

CONCLUSION

The determination that the allegations set forth in Petitioner's Amended Petition failed to make out a cause of action for defamation was decided by the Nebraska Supreme Court based on state law, and is therefore not appropriate for review in this case. The Nebraska Supreme Court also determined that no cause of action had been stated for the deprivation of constitutional rights, and the Nebraska Supreme Court's decision in this regard is in full accord with decided opinions of this Court and other federal courts, and is appropriate under Nebraska procedural law.

Accordingly, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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RESPONDENT'S APPENDIX A

IN THE DISTRICT COURT
OF CUSTER COUNTY, NEBRASKA

ROBERT E. WHEELER,	)	CASE NO.
	)	3022
Plaintiff,	)	
	)	
v.	)	
	)	
NEBRASKA STATE BAR ASSOCIATION,	)	ORDER
	)	
	)	(Filed March 20, 1992)
Defendant.	)	

NOW ON THIS 20th day of March, 1992, this matter comes before the Court. The Court finds that the Plaintiff has filed a notice to stand on his Amended Petition. Therefore, pursuant to the prior Order of this Court, the Court finds that the Amended Petition should be dismissed, without prejudice, at Plaintiff's costs.

SO ORDERED.

BY THE COURT:

/s/ John P. Murphy
John P. Murphy
District Judge

RESPONDENT'S APPENDIX B

IN THE DISTRICT COURT
OF CUSTER COUNTY, NEBRASKA

ROBERT E. WHEELER	)	Docket 61 Page 132
	)	Case No. 3022
Plaintiff,	)	
	)	
v.	)	ELECTION TO
	)	STAND ON
NEBRASKA STATE BAR	)	AMENDED PETITION
ASSOCIATION,	)	
	)	(Filed
Defendant.	)	March 5, 1992)

COMES NOW the plaintiff and elects to stand on his amended petition, without further amendment.

Dated March 4, 1992

ROBERT E. WHEELER, Plaintiff

/s/ Robert E. Wheeler
By Robert E. Wheeler
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511 No. 10th Ave
Broken Bow, NE 68822
Phone No. (308) 872-2823

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed a copy of the above pleading in the United States mail, postage prepaid, this 5th day of March, 1992, addressed to:

James A. Snowden, Attorney at Law, 1000 NBC Center, Lincoln, NE 68508

Hon. John P. Murphy, 301 N. Jeffers, North Platte, NE 69103-3931.

/s/ Robert E. Wheeler

LITIGATE\BARSUI13.DOC

RESPONDENT'S APPENDIX C

IN THE DISTRICT COURT
OF CUSTER COUNTY, NEBRASKA

ROBERT E. WHEELER	)	Docket 61 Page 132
	)	Case No. 3022
Plaintiff,	)	
	)	
v.	)	DEMURRER TO
	)	AMENDED PETITION
NEBRASKA STATE BAR	)	
ASSOCIATION,	)	(Filed
	)	October 11, 1991)
Defendant.	)	

The defendant, Nebraska State Bar Association, hereby demurs to the Amended Petition of the Plaintiff for the reasons that:

1. It fails to state facts sufficient to state a cause of action; and

2. The Petition shows on its face that the alleged defamatory publication is not susceptible to a defamatory construction; and

3. That the publication complained of is not actionable for the reason it is absolutely privileged and that the defendant is entitled to immunity from suit.

NEBRASKA STATE BAR ASSOCIATION, Defendant

By: KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
(402) 475-7011

/s/ By: James A. Snowden
James A. Snowden - #13927
One of Said Attorneys

NOTICE OF HEARING

TO: Robert E. Wheeler, Plaintiff:

You are hereby notified that the defendant will call the foregoing Demurrer for hearing in the District Court of Broken Bow County, Nebraska, before Judge John Murphy on the 29th day of November, 1991, at 10:00 a.m. or as soon thereafter as the same may be conveniently heard by the Court, and you are notified to govern yourself accordingly.

DATED this 11th day of October, 1991.

/s/ By: James A. Snowden
James A. Snowden

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing **Demurrer to Amended Petition** to be served on Robert E. Wheeler, Attorney at Law, 511 No. 10th Avenue, Broken Bow, Nebraska 68822 by First Class United States mail, sufficient postage prepaid on this 11 day of October, 1991.

/s/ James A. Snowden
James A. Snowden